UNITED STATES
v.
LESTER E. MARTIN

IBLA 72-156 Decided February 1, 1973

Appeal from Administrative Law Judge Dean F. Ratzman's 1/ decision (R-2736) declaring two mining claims null and void.

Affirmed.

Mining Claims: Discovery: Generally

A mining claim is properly held null and void in the absence of evidence showing the discovery of a valuable mineral deposit which would justify a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in an effort to develop a valuable mine.

Mining Claims: Possessory Right

A mining claimant's right to the land upon which his claim is located is merely possessory until a patent is granted.

Mining Claims: Generally--Mining Claims: Contests--Mining Claims: Withdrawn Land--Res Judicata

A civil action in a federal district court condemning a mining claim for a leasehold by the Department of the Navy is not res judicata to a subsequent contest challenging the validity of a claim prior to the condemnation.

APPEARANCES: Milton Wichner, Esq., Los Angeles, California, for contestee; George H. Wheatley, Esq., Office of Regional Solictor, United States
Department of Interior, for the United States.

1/ An order of the Civil Service Commission substituted the title "Administrative Law Judge" for that of "Hearing Examiner." 37 F.R. 16787 (August 19, 1972).

OPINION BY MR. RITVO

Lester E. Martin has appealed to the Secretary of the Interior from a decision by Administrative Law Judge Dean F. Ratzman declaring two mining claimsnull and void for lack of discovery.

The claims in issue are the Condor No. 1 and Condor No. 4 lode mining claims situated in an unsurveyed area in San Bernardino County, California, in what probably will be surveyed as sec. 33, T. 25 S., R. 45 E., M.D.M., and sec. 4, T. 26 S., R. 45 E., M.D.M. The area is now and has been since the beginning of World War II within the Department of the Navy's Mojave "B" Aerial Gunnery Range. The claims were located in 1938 by Lester Martin, J. A. Tinsley, Sr., and Howard F. Smith. Tr. 232. Martin now has sole interest in the claims following execution of quitclaim deeds to him in 1953 by Smith and Tinsley.

On behalf of the Naval Facilities Engineering Command, the Department of the Interior issued a complaint dated April 3, 1970, charging that valuable minerals had not been shown to exist within the limits of the mining claims in sufficient quantities to constitute a valid discovery.

In his answer, Martin alleged the following: (1) the claims are mining claims validated by discovery of valuable minerals in sufficient quantity; (2) a 1949 report by Val Payne, a Bureau of Land Management field examiner, validates a discovery and is res judicata on the issue of discovery; (3) the complaint fails to state a claim upon which relief can be granted; (4) the validity of the claims has been adjudicated in United States v. Certain Parcels of Land, Civil Action No. 3129-PH and United States v. 6,305.70 Acres of Land, Civil Action No. 769-60-PH, United States District Court, Central District, California; (5) the United States is now estopped, collaterally or equitably, from charging that the claims are invalid; (6) the contestant seeks to deprive Martin of his property without due process of law; (7) the Department of the Interior has no jurisdiction to bring suit against the claims during the pendency of United States v. 6,305.70 Acres of Land, Civil Action No. 65-1008-PH; and (8) the contestant has waived its right to contest the validity of Condor No. 1 and No. 4.

A hearing was held on December 10 and 11, 1970, in Los Angeles, California. Witnesses included Carl F. Austin, Research Geologist for the Naval Weapons Center, Lester E. Martin, and Martin's children, Larry Martin and Violet Smith. Judge Ratzman issued his decision on September 23, 1971.

Both the contestee's and the Bureau's counsel agreed that the determination of mineral value in concluding whether a valid discovery existed should be figured from September 2, 1943, the date the contestee was deprived of possession of his land. Tr. 4, 6. This date has been used in previous actions concerning other lands in which the Government acquired leasehold interests under Civil Action No. 3129-PH. 2/

The record shows that the work which Martin performed on the claims ceased in 1939. On September 2, 1943, the United States filed its complaint in Civil Action No. 3129-PH in the United States

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2/ The rationale for using the date is fully set out in United States v. Frank Coston, A-30835 (February 23, 1968), and cited in full in United States v. Lester E. Martin, et al., A-31050 (April 3, 1970), which are other cases involving mining claims in the gunnery range. The Martin decision quoted Coston as follows:

"* * * All public lands, unless withdrawn or otherwise closed to mineral entry, are open to exploration and appropriation under the mining laws of the United States, and an individual may take possession of vacant public land open to location and, after filing notice of location, retain that possession against all except the Government while he is in diligent porsecution of his efforts to discover valuable minerals. However, no rights against the Government are established under a mining claim except upon the discovery of a valuable mineral deposit within the limits of the claim, and, when the Government withdraws its consent to mining location, either by withdrawing the land from the operation of the mining laws or by otherwise making it unavailable for mining operations, the mining claimant must show that he made a discovery of a valuable mineral deposit prior to such withdrawal of consent in order to retain his possession. [Citations omitted.]

"It is not disputed that appellant has been prevented by governmental action from taking any steps since 1943 either to develop a mine or to explore for minerals on the claims in question. The question which must be determined here, however, is simply whether or not he has established any rights against the United States by virtue of a discovery of a valuable mineral deposit. If he has not, it is immaterial that he may have been prevented from making a discovery by action of the Government. [Footnote omitted.] Since a mining claimant acquires no rights against the United States prior to making a discovery, he cannot be heard to complain if the United States removes the land from further operation of the mining laws before he makes a discovery. * * *" Martin, supra, at 10.

District Court for the Southern District of California, Central Division, condemning a leasehold estate in certain patented and unpatented mining claims within the Navy's Mojave "B" Aerial Gunnery Range. Tr. 7-8. This area included the Condor No. 1 and No. 4. The proceeding was not concluded until December 31, 1959.

Civil Actions No. 769-60-PH and No. 65-1008-PH, both filed in the same District Court as No. 3129-PH, were in effect from January 1, 1960, until June 30, 1965, and from July 1, 1965, until June 30, 1970, respectively. Each action condemned, among others, the leasehold estate in the area comprising Condor No. 1 and No. 4. A petition to continue leasehold estates after July 1, 1970, was filed by the United States in Civil Action No. 70-1379-JWC and is still pending, but it does not list these two claims. However, they lie within the area which the Navy continues to utilize for gunnery purposes. (Tr. 8).

On September 1, 1943, the claims were leased to the United States for use by the Department of the Navy. The lease term was to run from September 1, 1943, to June 30, 1950, renewable from year to year thereafter, without further notice but not to extend beyond June 30, 1954.

In his decision Judge Ratzman pointed out that Field Examiner Payne's report did not bind the United States, whether he considered the claims valid or not, and that his recommendation could be modified, revoked or ignored by his superiors. He then set out in detail the evidence relating to discovery and held the claims were null and void for lack of discovery.

First, Judge Ratzman concluded that a discovery of valuable minerals had not been made within the limits of the Condor No. 1 claim because the veins were so narrow and the grade of the recoverable minerals was so low. The prices currently being paid for gold and silver are not sufficient to cover the increases in the cost of labor, tools, machinery, and other items required for mining operations. Second, the evidence of a valuable discovery on Condor No. 4 was no more convincing than the evidence submitted for Condor No. 1. As Judge Ratzman stated in his decision:

> My conclusions as to Condor No. 4 are the same as for Condor No. 1. In a thorough examination in which seven samples were taken Mr. Austin found that the veins on Condor No. 4 are even narrower than on Condor No. 1. Only two of the seven samples assayed higher than $4.07

> per ton ($12.23 and $14.63). Because there is no essential difference between the two claims I will make only a general reference to the considerations making it uneconomical to develop Condor No. 4 – hardness of rock preventing hand mining (sample Point M-13-4), loss of gold and silver in the available recovery processes, the expense entailed in removing high percentages of wall rock in order to have an adit of sufficient size, and the overall cost of labor, transportation and milling which would result in a loss for each foot of advance in an adit, or bring less than 25 cents an hour even to a one man subsistence operation. I find that a discovery of valuable minerals had not been made within the limits of the Condor No. 4 lode mining claim as of September 2, 1943.

There is nothing in the history of these claims which would warrant a departure from the usual rules governing the adjudication of mining claims. See United States v. Ray L. Stevens, et al., A-31052 (May 14, 1970); United States v. Lester E. Martin, et al., supra; United States v. Frank Coston, supra. Furthermore, Judge Ratzman dismissed contestee's allegations that actions by federal agencies or the courts in the condemnation suits precluded the present suit by the Government. Neither, he said, did the Navy's payment of $60 a year vest Martin with an uncontestable right to the claims. Since Martin did not have a patent on the land, his rights were only possessory. Best v. Humboldt Mining Co., 371 U.S. 334 (1963). Prior determinations by the agencies or the courts did not vest full title in Martin. The earlier actions merely decided the specific questions regarding temporary leases and did not litigate the issue of ownership. Therefore, he concluded, the previous decisions do not act as a bar to the current contest.

In his brief to the Judge, the contestee said that he elected to rely on his defenses of res judicata, estoppel and waiver and would make no effort to resolve the conflicts in evidence with respect to the making of a discovery in 1943. His statement in support of this appeal makes no attempt to point out an error in the Judge's evaluation of the evidence which he held required a finding that there had been no discovery of a valuable mineral deposit within either claim. Accordingly, since we agree with the Judge's resolution of that issue, we need not discuss it further.

In his statement of appeal, Martin emphasized the Judge's error of failing to dismiss the contest and of failing to recognize the

affirmative defenses. Martin listed four general arguments in his statement of appeal:

(1) Contestee's reliance on the Navy's payment of $60 per year rental and the United States District Court Civil Actions No. 3129-PH and No. 70-169-60-PH.

(2) It is unfair to place the burden of proof on the contestee in a War Emergency condemnation case.

(3) Estoppel should prevent the Government from invalidating claims which they had examined and approved 20 years earlier.

(4) Prior adjudication of the validity of the claims should have been conclusively binding on the Administrative Law Judge under the principles of res judicata.

Judge Ratzman adequately answered contestee's allegations of res judicata and estoppel due to the previous agency and court decisions. The prior determinations and condemnation proceedings dealt only with specific temporary leaseholds. They were not intended to decide the validity or invalidity of the Condor No. 1 and No. 4 mining claims. An action is res judicata only to a subsequent action between the same parties, upon the same cause of action. United States v. H. R. Johnson, 420 F.2d 955 (9th Cir. 1970). Even the successive condemnation suits were not res judicata to one another since each taking was for a different period in time. Id. Likewise, the determinations for fair rental value made by the Navy Department was for a specific period of time and only for its own purposes. As the Department stated in United States v. Ray L. Stevens, et al., A-31052 (May 14, 1970), another case holding a mining claim in the gunnery range invalid, the condemnation suits were a matter between the mining claimants and the Navy. This Department had no jurisdiction over them. Its jurisdiction in this case is limited solely to the questions of whether the mining claims were validated by a mineral discovery within the meaning of the mining laws.

Furthermore, the fact that a mining claim may have been found at one time to be valid does not estop the Department, under the principal of res judicata, from bringing an adverse proceeding against the claim to determine whether there is a present, validating discovery so long as title to the land is in the United States. United States v. Ideal Cement Company, Inc., 5 IBLA 235, 79 I.D. 117, 120 (1972); United States v. H. B. Webb, 1 IBLA 67 (1970).

The theory of estoppel is based on equitable relief and we do n not find it to be applicable to the instant case. Because Martin's claims were not validated by its actions, the United States was not precluded from subsequently contesting them.

Neither was Martin placed in an unfair position of bearing the burden of proof in the contest. Since the date of determining validity of discovery was 1943, Martin had not been prevented from entering his claim prior to that date. He only had to demonstrate a discovery prior to 1943 and during this time he had free access to the land. As the Department pointed out in United States v. Frank Coston, supra, and United States v. Lester E. Martin, supra, it is somewhat inconsistent for the appellant to allege first that he had made a discovery in 1943 and then that the United States has prevented him from making one thereafter. Since the United States could make the land unavailable for mineral location, the contestee must show a discovery while the land was open to mineral location. The Government adequately established its prima facie case for lack of discovery, and the record shows that the contestee f failed to overcome it and show a discovery.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the opinion of the Administrative Law Judge is affirmed.

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Martin Ritvo, Member

We concur:

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Edward W. Stuebing, Member

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Newton Frishberg, Chairman